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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA**

ANIBAL RODRIGUEZ, JULIEANNA  
MUNIZ, ELIZA CAMBAY, SAL  
CATALDO, EMIR GOENAGA, JULIAN  
SANTIAGO, HAROLD NYANJOM,  
KELLIE NYANJOM, and SUSAN LYNN  
HARVEY, individually and on behalf of all  
others similarly situated,

v.

GOOGLE LLC

Defendant.

Case No. 3:20-cv-4688-RS

**JOINT CASE MANAGEMENT  
STATEMENT**

Judge: Hon. Richard Seeborg  
Date: Thursday, November 18, 2021  
Time: 10:00 a.m.  
Place: Courtroom 3 – 17<sup>th</sup> Floor

Pursuant to Federal Rule of Civil Procedure 16, Civil Local Rules 16-9 and 16-10, the Standing Order for All Judges of the Northern District of California, the Court's Order of October 23, 2020 (Dkt. No. 59), and in advance of the Case Management Conference set by the Court for Thursday, November 18, 2021, at 10:00 a.m., Plaintiffs and Defendant, Google LLC ("Google"), hereby submit this Joint Case Management Statement to report the parties' progress since the previous Joint Case Management Statement was filed on October 8, 2020 (Dkt. 47).

## **I. JURISDICTION AND SERVICE**

Google has been served and the Court has jurisdiction over this matter.

## **II. FACTS**

### **Plaintiffs' Statement:**

This case is about Google's unlawful interception of user communications with third-party apps while users have "Web & App Activity" turned off. Google undertakes this WAA-off collection of user data without disclosure or consent by way of, at a minimum, Google's GA for Firebase, AdMob, and Cloud Messaging services.

Instead of getting user data directly from app servers, Google collects this information from users' devices. Google saves billions of dollars every year in processing power, bandwidth, and hardware costs by unlawfully collecting data from consumer devices and making them work for Google. Without controls, it is impossible for consumers to escape Google's tracking from cradle to grave, given Google's market power and ability to collect data via backdoors on countless apps. Although Google tries to excuse itself by arguing that it has "consent" from app developers to wiretap users' devices, the devices do not belong to Google or developers. And Google cannot have consent where it has concurrently represented to users that their "Web & App Activity" will not be tracked if the settings are turned off. Indeed, this Court has rejected Google's consent defense as to users, holding that "Plaintiffs offer a cogent account of why they saw WAA as capable of turning off GA for Firebase's collection of their third-party app data."

Dkt. 109 at 10.

47941                  Discovery has shown that Google's own employees agree with the Court (and Plaintiffs).  
 422.1 One employee, for example, complained that: "Today, we don't accurately describe what happens  
 1 when WAA is off ... given the way on/off works, one has to then assume that disabled (off)  
 2 would be the exact opposite of what is described for what happens when the WAA bit is on."  
 3 Dkt. 138 ¶ 261. The WAA and other controls imply we don't log the data, but obviously we do.  
 4 We need to change the description to indicate even with the control off, Google retains this data  
 5 and uses it for X purposes." Dkt. 138 ¶ 261. Other employees admit that people "don't know  
 6 what WAA means" and that turning WAA off leaves users with a "false sense of security that  
 7 their data is not being stored by Google, when in fact it is." Dkt. 138 ¶¶ 8-9.

8                  Google initially claimed that this case was limited to data collected through Google  
 9 Analytics for Firebase. Plaintiffs' Second Amended Complaint added allegations about AdMob  
 10 and Cloud Messaging, and the Court denied Google's motion to strike those allegations, holding  
 11 that the allegations "expand[] the scope of discovery." Dkt. 109 at 7-8. Plaintiffs are now  
 12 exploring in discovery how the data is also collected through and used by these additional Google  
 13 services. With their Third Amended Complaint, Plaintiffs added allegations about how Google's  
 14 Real Time Bidding product substantiates Plaintiffs' CIPA § 631 claim. Dkt. 138 ¶ 52. Google in  
 15 their Reply Brief admitted that Google uses data collected through GA for Firebase for Real Time  
 16 Bidding, Dkt. 145 at 5, and Plaintiffs are now seeking discovery about this use.

17                  **Google's Statement:**

18                  The claims Plaintiffs assert relate to the use by third-party app developers of a Google tool  
 19 called Google Analytics for Firebase ("GA for Firebase"). The apps at issue used GA for  
 20 Firebase to learn more about their users' interaction with the apps. App developers incorporated  
 21 Google's analytics tool into their app, causing some data about their users' interactions with their  
 22 apps to be sent to Google to be analyzed for the app developers. The apps that used GA for  
 23 Firebase were required by Google to disclose to users that they had authorized GA for Firebase to  
 24 receive data about user activity on the app, and they did. This case is therefore about the  
 25 authorized collection of data that users knowingly provided to apps so the app developers could

47941 understand the data using Google's tool. There is no actual claim that could be proved against  
 422.1 Google for providing this tool to app developers, the use of which is premised on the consent of  
 1 all involved in order to make apps better for everyone.

2 Plaintiffs therefore manufacture their theory of liability on the basis of a separate Google  
 3 account-level setting called Web & App Activity ("WAA"). While GA for Firebase is a tool for  
 4 developers, WAA is a tool for Google users. When WAA is "on," it allows Google to save a  
 5 user's online searches and activity in the user's Google account to help Google provide faster,  
 6 more relevant searches and other forms of personalized experiences across Google services.  
 7 Plaintiffs allege that when WAA is "off," GA for Firebase collects Plaintiffs' personalized  
 8 information contrary to Google's WAA-related disclosures.

9 Google denies Plaintiffs' claims. Setting aside the fact that apps and their users consented  
 10 to providing data to Google through GA for Firebase, the central allegation of Plaintiffs' case is  
 11 false. As Google has explained through documents and in a verified interrogatory response, if a  
 12 user has WAA off, Google takes extraordinary steps to ensure the data cannot be linked to any  
 13 particular user's identity or Google account. Because the data at issue is not personalized, all of  
 14 Plaintiffs' claims must fail.

### 15 **III. LEGAL ISSUES**

16 Apart from the currently-pending motions and ones the parties intend to file, as well as  
 17 legal issues relating to the Third Amended Complaint, the parties have no new legal issues to  
 18 present at this time.

### 19 **IV. MOTIONS**

#### 20 Motions Decided Since the Last CMC Statement:

21 The Court granted in part and denied in part Google's motion to dismiss the First  
 22 Amended Complaint, as well as Google's motion to dismiss the Second Amended Complaint.  
 23 Dkts. 109, 127.

24 The Court has resolved certain discovery disputes. *See* Dkts 85 (granting in part and  
 25 denying in part Plaintiffs' motion to compel documents); 106 (denying Plaintiffs' motion to

47941 compel Google to add additional custodians); 111 (order on Plaintiffs' motion to compel 30(b)(6)  
 422.1 deposition).

1           The Court has granted numerous *pro hac vice* applications. Dkts. 81, 90, 133, 150.

2           The Court denied a motion to seal. Dkt. 108.

3           Pending Motions:

4           Pending before the Court is Google's Motion to Dismiss the Third Amended Complaint.  
 5 Dkts. 139, 144 & 145. Also pending before the Court is Plaintiffs' Motion for Relief from the  
 6 Case Management Schedule seeking a six-month extension of the fact discovery deadline.  
 7 Dkt. 153. Google's deadline to file a response to that motion is November 12, 2021.

8           Plaintiffs' Request for Google to Search Additional Custodians' ESI (Dkts. 155 & 163) is  
 9 pending before Magistrate Judge Tse. The parties will tomorrow file a letter brief regarding  
 10 Plaintiffs' Request for an Order Requiring Google to Negotiate and Propose a Preservation Plan  
 11 for this Case and Perform Other Related Preservation Actions.

12           Various administrative motions to seal are pending. Dkts. 152, 154, 162.

13           Anticipated Motions:

14           Plaintiffs anticipate seeking class certification and summary judgment. Plaintiffs also  
 15 anticipate filing several discovery disputes with Magistrate Judge Tse. These disputes were  
 16 outlined in Plaintiffs' Motion for Relief from Case Management Order, Dkt. 153 at 8-9, and they  
 17 are briefly summarized below:

- 18           • **Claw Back Dispute:** Plaintiffs are challenging Google's decision to claw back a  
                   19 document pursuant to the Stipulated Protective Order. Google is drafting its  
                   portion of the letter brief.
- 20           • **Search Terms:** Plaintiffs and Google are continuing to negotiate compromises for  
                   21 some search terms, but have reached impasse on others and will file a letter brief.
- 22           • **Privilege Log Challenges:** Plaintiffs anticipate challenging some of Google's  
                   23 privilege log entries.
- 24           • **Source Code:** Plaintiffs anticipate moving to compel Google to produce source  
                   code.

- 47941 • **30(b)(6) Depositions:** The parties are trying to reach an agreement on the manner  
422.1 in which 30(b)(6) depositions will proceed and whether Plaintiffs can amend their  
3 30(b)(6) notice to add additional topics. If necessary, Plaintiffs will raise the issue  
with Magistrate Judge Tse.
- 1 • **Regulatory Documents:** Plaintiffs seek documents relating to internal Google  
2 projects regarding data collection and use that Plaintiffs believe violate regulatory  
3 orders. If necessary, Plaintiffs will move to compel.
- 4 • **Production of WAA Data and Identification of Logs and Data Sources:**  
5 Plaintiffs seek data identifying all individuals who turned off WAA and the time  
6 period during which WAA was off, as well as all logs and data sources reflecting  
7 WAA-off data collection and use of that data. Google believes this request is  
premature prior to class certification. If this dispute cannot be resolved, Plaintiffs  
will move to compel.
- 8 • **RFPs:** Google has objected to various RFPs that Plaintiffs have served, including  
9 requests for documents regarding GMS, Real Time Bidding, and Google's profits  
10 from WAA-off data collection and use. If these disputes cannot be resolved,  
Plaintiffs will raise them with Magistrate Judge Tse.
- 11 • **Plaintiffs' Consulting Experts:** Google has objected to Plaintiffs sharing  
12 protected material with certain retained consultants. The parties will meet and  
confer to attempt to resolve this dispute without court intervention.

13 Google anticipates filing a motion for summary judgment. Google will oppose Plaintiffs'  
14 motion for class certification and motion for summary judgment. Google plans to oppose  
15 Plaintiffs' anticipated discovery disputes.

## 16 V. AMENDMENT OF PLEADINGS

17 Plaintiffs filed the Third Amended Complaint on September 1, 2021. Dkt. 138. Although  
18 Plaintiffs believe that their Complaint is well-pleaded, and not subject to a motion to dismiss, a  
19 fully briefed motion to dismiss has been submitted to the Court for decision. Dkts. 139, 144 &  
20 145. Nonetheless, depending on the Court's decision, Plaintiffs reserve their right to seek leave to  
21 file an amended complaint to expedite the adjudication of this case.

## 22 VI. EVIDENCE PRESERVATION

### 23 Plaintiffs' Statement:

24 Plaintiffs remain concerned that Google is not preserving and is in fact destroying relevant  
25 evidence, including without limitation data from two relevant logs that it admits contain the data

sent to and held by Google via GA for Firebase when users' Web & App Activity WAA toggle is not set to 'on'—material that Google routinely purges every 56 days. Plaintiffs also believe that Google is deleting information relating to Google's collection and use of private browsing data, in violation of its "duty to preserve evidence that is relevant or could reasonably lead to the discovery of admissible evidence." *Bright Sols. for Dyslexia, Inc. v. Doe I*, No. 15-CV-01618-JSC, 2015 WL 5159125, at \*2 (N.D. Cal. Sept. 2, 2015). Further, Google has steadfastly refused to identify which data sources may be relevant to other at-issue WAA-off collection and use of that data and has not identified any data sources or logs for AdMob even though Google does not dispute that AdMob is used for real-time-bidding, which includes the mobile app URLs even when WAA/sWAA is off. Google has further refused to identify any data sources or logs for Cloud Messaging. Plaintiffs believe these logs exist and fear Google is routinely spoliating this and other relevant evidence.

Plaintiffs have asked Google whether it has and is preserving this relevant data and Google has not provided a meaningful response. Plaintiffs were seeking to negotiate a preservation plan with Google as was done in the similar *Brown* and *Calhoun* cases pending before Judge Koh, but Google has refused to engage in those negotiations. A joint discovery letter brief will be filed tomorrow that raises these issues with Magistrate Judge Tse.

#### **Google's Statement:**

There is no federal or local rule that requires a "preservation plan." Google is complying with its obligations to preserve relevant ESI under the Federal Rules of Civil Procedure and this Court's guidance on ESI issues. Since the inception of this case, Google's counsel has engaged in dozens of conversations with Plaintiffs' counsel regarding its plans for preserving relevant ESI. And it has complied with its obligations to disclose to Plaintiffs information about its preservation efforts in good faith. That includes telling Plaintiffs from the very beginning, at the parties' Rule 26(f) conference, that Google would not preserve raw data flows from millions of users, numbering billions of entries per day, because doing so would be unreasonable, not called for by Google's evidence preservation obligations, and unprecedented. Plaintiffs have known Google's

position for thirteen months, but they have only recently brought the issue to a motion to compel; that motion will be filed tomorrow. The information Plaintiffs seek is extraordinarily burdensome to preserve, un-useable and irrelevant.

## VII. DISCLOSURES

The parties exchanged initial disclosures. Plaintiffs served their initial disclosures on October 7, 2020. Google served its initial disclosures on October 27, 2020.

## VIII. DISCOVERY

### A. Case Schedule

The Court entered the initial Case Management Scheduling Order in the case on October 23, 2020. Dkt. 59. Plaintiffs amended their complaint on November 11, 2020. Dkt. 60. The parties stipulated on August 13, 2021, to extend the fact discovery cut-off and expert disclosure deadlines by 60 days, to January 11, 2022.

On October 29, 2021, Plaintiffs filed a Motion for Relief from the Case Management Schedule seeking a 6-month extension of all deadlines. Google intends to oppose. Dkt. 153. Google's current deadline to file a response to that motion is November 12, 2021.

On November 1, 2021, the Court issued a Case Management Scheduling Order extending fact discovery and expert disclosure deadlines 30 days until February 10, 2022 to permit the parties to complete their briefing on Plaintiffs' Motion for Relief without risking the need for duplicative depositions. Dkt. 156.

### B. Written Discovery Since Last Joint CMC Statement.

Plaintiffs have served six sets of Requests for Production (RFPs) totaling 184 requests; five sets of Interrogatories totaling 11 interrogatories; and two sets of Requests for Admission (RFAs) totaling 13 requests. Google has served two sets of Interrogatories totaling five requests; two sets of RFPs totaling 11 requests; and one set of RFAs totaling 25 requests. Both parties have responded to each set of discovery requests.

### C. Depositions

No depositions have yet been conducted in the matter. Google has noticed the depositions

47941 of the named Plaintiffs for the December 6-9, 2021. Plaintiffs intend to depose Google employees  
 422.1 and 30(b)(6) depositions of Google.

1           **D. Protective Order**

2           The parties were able to agree on all terms of a protective order, which Judge Seeborg  
 3           approved on January 7, 2021. Dkt. 70.

4           **E. ESI Protocol**

5           The parties stipulated to an order related to ESI discovery, which was approved on  
 6           January 20, 2021. Dkt. 73.

7           **F. Discovery Update**

8           **Plaintiffs' Statement:** Given the complexity of the case, Google's production of  
 9           documents has been underwhelming and Google's unwillingness to produce documents and  
 10          identify information sources is holding up depositions in the case. To date, Google has only  
 11          produced 13,707 documents, which were limited to Google Analytics. Included in that number,  
 12          only 6,304 documents have been produced from Google's ESI search of just three Google-  
 13          selected custodians. That production pales in comparison to the 714,197 documents comprising of  
 14          more than 5.3 million pages produced by Google in the similarly complex *Brown v. Google*  
 15          matter pending before Judge Koh and Magistrate Judge van Keulen, where there are 42 Google  
 16          custodians. Worse yet, Google has only agreed to produce documents from five custodians of its  
 17          own choosing, including documents from a single custodian for AdMob and a single custodian  
 18          for Cloud Messaging—both of which are complex technologies put at issue in the Third  
 19          Amended Complaint and are critical to Plaintiffs' case. Plaintiffs believe this is insufficient.

20           **Google's Statement:**

21           Google has been diligently working to identify and produce responsive documents for  
 22          over 11 months. Google has thus far produced over 40,000 pages of documents comprising nearly  
 23          13,000 documents, covering the relevant topics implicated by Plaintiffs' remaining claims. This is  
 24          a straightforward case and Plaintiffs' theory is limited following this Court's rulings on Google's  
 25          motions to dismiss dismissing various aspects of this case. Dkt. 109. The questions of fact that

remain are: (1) what Google told users about WAA, (2) how GA for Firebase works, and (3) the proper calculation of damages, if any. Dkt. 155. Google has designated five custodians: one individual each who has responsibility for the aspects discussed by Plaintiffs in their complaints of Firebase, GA for Firebase, WAA, AdMob, and Cloud Messaging. Google has substantially completed production of documents for the first three custodians, now totaling over 7,000 files, and Google is in the process of searching thousands more for the latter two. Over the last eight months, Google has made repeated compromises to employ the vast majority of Plaintiffs' proposed search terms.

## IX. CLASS CERTIFICATION

The parties have reviewed the Procedural Guidance for Class Action Settlements.

**Plaintiffs' Statement:** Plaintiffs propose that two classes be certified pursuant to Federal Rules of Civil Procedure 23(a), 23(b)(2), 23(b)(3), and/or 23(c)(4), and intend to file a motion for class certification on a schedule to be set by the Court for the following classes:

- Class 1 – All individuals who during the Class Period (a) turned off “Web & App Activity,” and (b) whose mobile app activity was still transmitted to Google, from (c) a mobile device running the Android operating system (OS), because of Firebase SDK scripts, on a non-Google branded mobile app.
- Class 2 – All individuals who during the Class Period (a) turned off “Web & App Activity,” and (b) whose mobile app activity was still transmitted to Google from (c) a mobile device running a non-Android operating system (OS), because of Firebase SDK scripts, on a non-Google branded mobile app.

Plaintiffs contend the classes meet all of the requirements set forth in Rule 23. Plaintiffs' claims are typical of the claims of all other members of the proposed classes because they were uniformly affected by Google's wrongful conduct in violation of federal and state law. Plaintiffs will fairly and adequately protect the interests of the members of the proposed classes, as they have retained counsel who are competent and experienced in class litigation, including nationwide class actions and privacy violations. Plaintiffs and their counsel have no interests that

47941 conflict with, or are otherwise antagonistic to the interests of the members of the proposed  
 422.1 classes, they are committed and have the resources to vigorously prosecute this action on behalf  
 1 of the members of the proposed classes. Plaintiffs also contend a class action is superior to all  
 2 other available methods for the fair and efficient adjudication of this controversy since joinder of  
 3 all members of the proposed classes is impracticable. The proposed class action presents fewer  
 4 management difficulties than individual litigation, and provides the benefits of a single  
 5 adjudication, economies of scales, and comprehensive supervision by this qualified Court.  
 6 Furthermore, the expense and burden of individual litigation make it impossible for members of  
 7 the proposed classes to individually redress the wrongs done to them through Google's conduct.

8 Google's Terms of Service also compel application of California law, which states  
 9 "California law will govern all disputes arising out of or relating to the[] terms, service specific  
 10 additional terms, or any related services, regardless of conflict of laws rules. These disputes will  
 11 be resolved exclusively in the federal or state courts of Santa Clara County, California, USA, and  
 12 you and Google consent to personal jurisdiction in those courts." By choosing California law for  
 13 the resolution of disputes covered by its Terms of Service, Google concedes that it is appropriate  
 14 for this Court to apply California law to the instant dispute.

15 Further, California's substantive laws may be constitutionally applied to the claims of  
 16 Plaintiffs and the proposed classes under the Due Process Clause, *see U.S. CONST. amend. XIV,*  
 17 § 1, and the Full Faith and Credit Clause, *see U.S. CONST. art. IV, § 1, of the U.S. Constitution.*  
 18 California has significant contact, or significant aggregation of contacts, to the claims asserted by  
 19 Plaintiffs and all members of the proposed classes, thereby creating state interests that ensure that  
 20 the choice of California state law is not arbitrary or unfair. Google's decision to reside in  
 21 California and avail itself of California's laws, and to engage in the challenged conduct from and  
 22 emanating out of California, renders the application of California law to the claims herein  
 23 constitutionally permissible. The application of California laws to the proposed classes is also  
 24 appropriate under California's choice of law rules because California has significant contacts to

47941 the claims of Plaintiffs and the proposed classes, and California has a greatest interest in applying  
 422.1 its laws here.

1 Plaintiffs will also seek injunctive relief. Google should delete all of the data it has  
 2 impermissibly collected from users.

3 **Google's Statement:** Google does not believe that any class should be certified.

4 **XII. SETTLEMENT AND ADR**

5 No settlement discussions have taken place. Pursuant to ADR Local Rule 3-5 and Civil  
 6 Local Rule 16-8, on September 23, 2020, the parties met and conferred regarding the available  
 7 dispute resolution options. Google has filed its ADR Certification. Dkt. 40. Plaintiffs have filed or  
 8 will file shortly their respective ADR Certifications. The parties do not believe that ADR is  
 9 appropriate at this time.

10 DATED: November 10, 2021 SUSMAN GODFREY L.L.P.  
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17  
18 DATED: November 10, 2020

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## ATTESTATION

I, Eduardo E. Santacana, hereby attest, pursuant to N.D. Cal. Civil L.R. 5-1, that the concurrence to the filing of this document has been obtained from each signatory hereto.

DATED: November 10, 2021

By: /s/ Eduardo E. Santacana